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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-5853

LEON DUNAGAN,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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The Petitioner, LEON DUNAGAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Appellate Court of Illinois.

OPINION BELOW

Opinion of the Appellate Court of Illinois, First District, appears in Appendix A hereto.

JURISDICTION

The Opinion and Judgment of the Appellate Court of Illinois, First District, was entered on April 19, 1979. The Supreme Court of Illinois denied a timely filed Petition for Leave to Appeal on October 1, 1979. See Appendix B hereto. This Petition for Certiorari is filed within ninety (90) days of said ruling of the Supreme Court of Illinois. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the warrantless, nonexigent, arrest of Petitioner in his home violate his rights under the Fourth and Fourteenth Amendments?

2. Should the fruits of the unconstitutional arrest of Petitioner have been suppressed?

3. Should the involuntary statement of Petitioner and the tainted photographic identification of Petitioner have been suppressed?

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Illinois Revised Statutes, chapter 38, Sections 107-1 and 107-2 are involved herein and are set forth in Appendix C.

STATEMENT OF THE CASE

On December 26, 1971, Oscar Boyd was shot and killed near Wabash and 63rd Streets in Chicago, Illinois (Tr. 58-61, 74-77).* Boyd had been at a reunion of his high school class. He left the reunion, at which alcoholic beverages were being served, with Barbara Abston, Richard Brunson, Norma Statum and Mary Williams (Tr. 64-66, 224, 313). The group left in Boyd's 1971 Cadillac to look for Brunson's red Volkswagen, which was not where he had parked it (Tr. 66-70, 193). As they approached 63rd and Wabash, Brunson saw his car. Boyd stopped his car, put it in reverse and blocked the path of the Volkswagen (Tr. 69-70). Boyd and Brunson got out of the car. There were four black males in the Volkswagen. They got out of the car and started running away (Tr. 71-72, 90). Boyd and Brunson gave chase. Boyd yelled "Hey" and the driver of the Volkswagen stopped, turned, fired once and killed Boyd (Tr. 71-75).

The driver was wearing a leather coat, a wool cap with a ball on it, dark slacks and had a gun. He was approximately 6' tall and was nineteen to twenty years of age, of medium complexion and build (Tr. 201).

Barbara Abston described the driver of the Volkswagen as being approximately 6'1", medium build, medium brown skin, wearing a dark leather jacket (three-quarter length) and a brown knit cap with a tam on its top (Tr. 72). She was not, however, able to identify the driver and did not identify the Petitioner (Tr. 77). Norma Statum could not identify the people in the Volkswagen (Tr. 135).

Richard Brunson testified that he saw the driver from the shoulder up (Tr. 199). The driver was wearing a leather coat, a wool cap with a ball on it, dark slacks and had a gun. He was

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*References to Tr. ___ are to the trial and post-trial proceedings page(s). CLR. ___ refers to pages in the Common Law Record.

approximately 6' tall and was nineteen to twenty years of age, of medium complexion and build. Brunson identified the Petitioner, Leon Dunagan, as that man (Tr. 201). The boys were running away from the car, Boyd and Brunson (Tr. 202). The Volkswagen was approximately 10 to 20 feet from the Cadillac (Tr. 318-323).

Brunson testified that Boyd (the deceased) was running the entire time after he got out of the car (Tr. 325). Brunson was five to ten feet from the Cadillac at the time the shot was fired. He further testified that the persons whom Boyd was running after were about 100 feet away from Boyd when the single shot was fired (Tr. 326). Brunson did not see where the persons from the car went (Tr. 363).

The persons got out of the Volkswagen and were running with their back to him (Tr. 337). Miss Williams had to move in order to allow him to get out of the car (Tr. 338-339). The persons never stopped running from the time they left the Volkswagen (Tr. 340, 348).

By the time Brunson got out of the car, the driver of the car was already running away from him (Tr. 341), and had outdistanced him by 80 feet (Tr. 341-42). The weather was misty and drizzling rain (Tr. 344-45).

Brunson stated that from the time that he first saw the person in the Volkswagen behind the driver's seat until the time the person jumped out and started running 8 to 10 seconds elapsed and he had no idea how much time elapsed between the time the person proceeded running and the time he fired the shot (Tr. 347-48). As Boyd went down, the boys continued running and entered the housing project at 6215 South Wabash.

On the evening of December 28, 2 days following the homicide, Investigators Duncan and Wiley went to a gas station at 63rd and Wabash where they saw a group of young people tampering with a vehicle. All of the group fled when the officers approached except Reginald Brown, aged 14 to 16, who entered the squad car

and spoke with the officers (Tr. 477-84). Neither officer knew Brown, nor had they ever received information from him (Tr. 490). Brown told them that he had heard from one Toby Harris that the Petitioner had killed Boyd (Tr. 814-18).

Officer Wiley testified that after speaking with Reginald Brown, he and officer Duncan went to Petitioner's home, 6215 South Wabash, apartment 1002, at approximately 9 p.m. on December 28. The officers had no warrant. Upon arriving, the officers informed Mrs. Dunagan, Leon's mother, that they wanted to take Leon to their office and talk to him about a shooting. Petitioner was a juvenile at the time. They handcuffed Leon, took his coat, placed him under arrest when he refused to go with them and left (Tr. 408, 828-29). As they left the building, 15 to 20 sniper shots were fired at Dunagan, Officer Wiley and Officer Duncan (Tr. 408). The three reached the squad car and proceeded to the police station where Officer Wiley discovered he had been shot. Investigator Duncan took Petitioner into the building, cuffed him to a radiator bracket, and took Wiley to the hospital (Tr. 409-10).

When Officer Duncan returned to headquarters several hours later, he advised Petitioner of his constitutional rights, and the Petitioner told the officer that he would like to speak with his mother before he proceeded (Tr. 412). The officer allowed him to use the telephone, at which time he placed two calls. After making the calls, Dunagan told the officer he had spoken with his mother and he wanted to talk about the shooting (Tr. 413-16). Petitioner also stated that his mother, due to her work schedule, could not be there, but had told him she would take care of everything the next day. No written record of the conversation with Duncan was made (Tr. 534).

Thereafter, Investigator Duncan called an Assistant State's Attorney. When the assistant arrived, he again advised Petitioner of his constitutional rights and asked him if he wanted

to give a statement. The Petitioner replied that he would give a statement and did so at approximately 3:30 a.m. (Tr. 419-21, 981). The court reporter testified that the statement was typed later and was not read to the Petitioner in his presence (Tr. 594-96). The Petitioner never signed the statement (Tr. 424-25).

At trial, the three boys who had been in the car with Petitioner testified against him. Their identity had been disclosed by Petitioner's statement. Petitioner's coat was also introduced into evidence.

During the trial, Brunson testified he had at one time taken part in a photographic identification procedure (Tr. 214). Brunson testified that he picked out a picture of Petitioner several days after the shooting (Tr. 215). The State did not have any of the pictures that had been shown Brunson (Tr. 215), nor were there police reports which reflected which photos, if any, were shown to him (Tr. 216, 226-27). Defense Counsel had not previously been shown the Grand Jury testimony of Brunson (Tr. 216-17, 269).

The Court, after being apprised of the foregoing, interrupted the trial and held a hearing on the Petitioner's motion to suppress any photographic identification made by Brunson (Tr. 237-38). The photographic identification took place after Petitioner Dunagan's arrest (Tr. 242). Investigator Duncan testified that he had knowledge that Brunson was shown photographs. He did not know who showed him the photographs nor had he ever seen the photographs. Duncan testified that he spoke to several of the investigating officers and they didn't show any of the photographs to Brunson (Tr. 248-50). Duncan did not recall any police report concerning Brunson looking at pictures (Tr. 255). Officer Wiley had told Duncan that he may have shown Brunson pictures before the arrest (Tr. 259). The Court denied the motion to suppress references to the photographic identification (Tr. 271).

Brunson then testified that on the day after the incident

he looked at some photographs. He did not remember how many photographs he looked at nor did he recognize anyone in the photographs (Tr. 273-74). Several days later, he viewed several photographs, the exact number of which he did not recall, and identified Leon Dunagan (Tr. 275).

The officers showed him several pictures. Brunson did not recall whether it was day or night, light or dark, which officers he spoke to, the number of officers, how long he had been there or who showed him the picture. He was uncertain as to the race of the officer. He had never seen the officer before nor since. He did not recall signing any document or paper. He did not recall the number of pictures shown. He could not recall how many persons were present or who was present when he made the identification. He did not know what time it was (Tr. 285-89). As to the picture of Leon Dunagan, Brunson testified on cross-examination that he imagined he saw one picture which he believed to be color. He didn't remember whether it was a full-length picture or a partial (Tr. 290). He did not recall the hair style of the person in the picture nor could he tell if the person had sideburns (Tr. 291, 293). He did not recall the type of haircut on Dunagan (Tr. 294). He did not recall the color of the outer garment or whether it was long-sleeved or short-sleeved (Tr. 294-95). He did not know the color of the pants (Tr. 296). The witness never was asked and did not view a lineup (Tr. 310-11).

During the post-trial hearing, a report was disclosed indicating that Brunson had been recontacted and looked at pictures before Petitioner's arrest. It further stated that he had liked the picture of Terrell Donagan, who was a prime suspect, and also a Norman Witherspoon, who lived at 6215 South Wabash, the same address as Petitioner, and also liked the photo of Joseph Collins (Tr. 1451). This report was marked Defendant's Post Trial Exhibit No. 1 for identification.

On October 21, 1975, Dunagan was sentenced, after a jury trial, to not less than 50 years and not more than 100 years incarceration in the Illinois State Penitentiary (Tr. 1511).

REASONS FOR GRANTING THE WRIT

I

DID THE WARRANTLESS, NONEXIGENT, ARREST OF PETITIONER IN HIS HOME VIOLATE HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS?

The facts concerning the arrest of Dunagan are not in material dispute. The police officers, at the time of Dunagan's arrest, in his own home, did not have a warrant, nor were there exigent circumstances justifying immediate arrest. The police officers had seen several young men tampering with a vehicle. One of them, Reginald Brown (aged 14-16), who neither officer knew, told them that he had heard from someone else that Dunagan had been involved in the murder of Boyd. Based on these facts alone, the police officers went to Petitioner's home, entered it, and placed him under arrest.

A. Warrantless Entry Into Home

Recently, in October, 1979, this Court heard reargument in the cases of Payton v. New York, No. 78-5420 and Riddick v. New York, No. 78-5421, as reported in 48 U.S.L.W. 3251. Payton and Riddick concern the very issue which Petitioner has raised herein, i.e. whether a warrantless entry into a person's home to arrest him is unconstitutional in the absence of exigent circumstances. A plurality of four Justices in Coolidge v. New Hampshire, 403 U.S. 443 (1971), which was decided prior to Petitioner's arrest, indicated that such a warrantless entry in the absence of exigent circumstances was unconstitutional. See Coolidge v. New Hampshire, 403 U.S. 443, 477-78 (1971). During the pendency of the Payton and Riddick cases, the Eighth Circuit, in U.S. v. Houle, 48 U.S.L.W. 2207 (August 17, 1979) (which was brought to the attention of the Illinois Supreme Court in the instant case during the pendency of the Petition for Leave to Appeal) reached a conclusion opposite from the conclusion reached by the New York courts in Payton and Riddick. In addition, on August 1, 1979, an amendment to Fed. R. Crim. P. 41 went into effect which establishes a procedure by which

law officers can obtain search warrants for persons.

The undisputed facts in the instant case make it clear that no exigent circumstances existed for the arrest of Petitioner, that the arrest occurred in Petitioner's home and that there was no warrant for his arrest. Moreover, as Petitioner has challenged in Point I(B) below, there existed no probable cause for his arrest.

The officers in the instant case were presumably acting under the authority of Ill. Rev. Stat. ch. 38 §107-2, set forth in Appendix C hereto, which establish the procedures by which an arrest may be effected. The Illinois Appellate Court, in the instant case, completely ignored Petitioner's argument, which was raised both at the trial court in a hearing on a motion to quash the arrest and on appeal, as to whether a warrant is required in order to effectuate a nonexigent arrest in a person's home. As discussed below, the Illinois Appellate Court dealt solely with the issue, in its Opinion, of whether probable cause existed for the arrest.

Petitioner believes that his case raises the exact same issue raised in Payton and Riddick and therefore requests that this Honorable Court grant the petition for writ of certiorari and set this matter down for supplemental argument and for this Court's consideration in connection with Payton and Riddick.

B. No Probable Cause Existed for the Arrest of Petitioner

The Illinois Appellate Court held that the arrest was proper because the officers had probable cause. This was based on Brown's hearsay statements combined with a general description and the fact that the assailant had ran near or into the housing project building in which the Petitioner resided. (Illinois Appellate Court Opinion, pages 5-7, Appendix A). However, the Appellate Court made two errors. First, because there were non-exigent circumstances, the officers were required to obtain a warrant. See Point I(A) above. Second, the factors relied upon for corroboration of Brown ignore the undisputed facts that Brown

was not known to the officers, had never given them information before, was involved in a suspicious activity when approached, merely told the officers what someone else had told him about the occurrence and the corroborative information was generalized, at best.

The decision of the Illinois Appellate Court is in conflict with this Court's decision in Dunaway v. New York, ___ U.S. ___ , 47 U.S.L.W. 4635 (June 5, 1979) and the established case law.

In the instant case, as in Dunaway, it is clear that the informant's information would not have been sufficient to obtain a warrant. Brown's statements were triple hearsay and were corroborated only in the most generalized sense. It is not unusual for residents in an area to know general facts concerning a crime that took place in that area. The factors listed by the Illinois Appellate Court were not enough to provide probable cause and, therefore, Petitioner's arrest was illegal. See Dunaway, supra, 47 U.S.L.W. at 4637-40.

II

SHOULD THE FRUITS OF THE UNCONSTITUTIONAL ARREST OF PETITIONER HAVE BEEN SUPPRESSED?

Once it has been established that an arrest has been illegally made, all evidence that flows from that arrest, including admissions, must be suppressed. In the instant case, the Petitioner was taken from his home in the evening to the police station pursuant to an unconstitutional arrest. Also seized by the police was Petitioner's jacket, later introduced into evidence as being similar to one worn by the assailant (Tr. 358-59). He was handcuffed and left there by himself in a room for several hours. Upon the return of the police officer, sometime in the early morning, a court reporter was eventually called and a statement made in the presence of the court reporter and State's Attorney. Additionally, the trial court let Officer Duncan testify as to various statements that were made prior to the court reporter's statement. As a result of the statements, a photographic identification, discussed infra Point III(B), was made, and the identity of three persons who later testified against Petitioner was discovered.

This Court in similar circumstances, recently held that the giving of the Miranda warnings does not validate the statement and that all statements and evidence that flow from the illegal arrest must be suppressed. See Dunaway v. New York, ___ U.S.___ , 47 U.S.L.W. 4635 (1979) and Brown v. Illinois, 422 U.S. 590 (1975).

Even if the statements of Dunagan are found to be voluntary, see Point III(A) infra, this Court in Brown made it clear that that is only the "threshold requirement" for Fourth Amendment analysis. 422 U.S. at 604. The test is the "but for" rule. Id. at 600. In the instant case, but for the illegal seizure, the coat, identification and statements never would have been obtained. It is also clear, that as to the statements, the temporal proximity of it to the arrest, the intervening circumstances

(Dunagan and the officers being shot at, Dunagan being handcuffed to a radiator for several hours, and the other factors set forth in Point III(A) infra) and the flagrancy of the misconduct make it clear that the evidence resulting from the illegal seizure should have been suppressed.

III

SHOULD THE INVOLUNTARY STATEMENT OF PETITIONER AND THE TAINTED PHOTOGRAPHIC IDENTIFICATION OF PETITIONER HAVE BEEN SUPPRESSED?

A. The Involuntary Statement

At trial and on appeal, Petitioner challenged the validity of certain statements made by him after his arrest. Petitioner, at the time of his arrest, was a juvenile. After having been arrested at 9:00 p.m. in his home, without a warrant, he and the officers were shot at. He was then taken to the police station, handcuffed to a radiator for several hours while Officer Duncan took his partner, Officer Wiley, to the hospital for treatment for gunshot wounds. Upon Officer Duncan's return in the early morning hours, he called a court reporter and an Assistant State's Attorney who came and took a statement from Dunagan at 3:30 a.m. It is undisputed that Petitioner did not sign the statement.

Before giving his statement, Dunagan indicated that he had spoken to his mother and that his mother had stated that she would be by to take care of everything on the next day, but could not be there during the questioning. See C.L.R. 62. At this point, it became incumbent upon the police officers to cease their questioning of Dunagan until such time as his mother could be present for the questioning. Moreover, the statement which Dunagan gave was inconsistent with the known facts in the case and was highly unreliable. See Tr. 986-1004.

Once a request has been made to cease questioning, the officers have the responsibility to do so. See, Brewer v. Williams, 430 U.S. 387 (1977). Officers must make an even more vigilant effort in the context of a juvenile to protect his rights under the Miranda decision. See People v. Hanson, 31 Ill. 2d, 198 N.E. 2d 815 (1964); and People v. Perkins, 17 Ill. 2d 493, 162 N.E. 2d 385 (1959). In addition, the context in which the statement was taken clearly demonstrates it was involuntary. The age of the

accused, the nature of the arrest, the circumstances surrounding his custody, the attempt to have his mother present and the refusal to sign the statement are factors which indicate that the statement was involuntary. See, e.g., Ashcraft v. Tennessee, 322 U.S. 143 (1944); Johnson v. New Jersey, 384 U.S. 719 (1966); see also Brown v. Illinois, 422 U.S. 590 (1975).

B. The Tainted Photographic Identification Testified to by Brunson Should Have Been Suppressed

The trial court allowed testimony by Brunson that he had identified Dunagan in a photographic identification. This testimony of Brunson was unsupported by any written report. None of the police officers involved in the investigation recalled making the identification with Brunson. Moreover, there were no written reports regarding the identification of Petitioner nor were the photographs available.

Where impermissibly suggestive identification procedures are utilized, refusal to suppress the identification is improper and a new trial should be granted. See Simmons v. U.S., 390 U.S. 377 (1968); Neil v. Biggers, 409 U.S. 188 (1972); and People v. Holiday, 47 Ill. 2d 300, 265 N.E. 2d 634 (1970). In Holiday, a murder case, the Court stated that they agreed that the utilization of photographs is not a desirable practice when the suspect is in custody and a lineup is feasible. In the instant case, Dunagan was in custody at the time that Brunson testified he made the alleged identification. Moreover, no evidence was established to show why a lineup could not have been held. No lineup was ever attempted with any of the witnesses in the case. Also, the prejudice to the Petitioner was heightened because the photographs were not available at trial.

The facts indicated that witness Brunson had come from a party and a reunion which had gone on for some hours, and at which alcoholic beverages were served. The weather was misty. The assailant was running in a direction opposite from Brunson

and turned only briefly when the shot was fired. Moreover, the evidence established that the assailant was quite some distance from Brunson and Boyd at the time the shot was fired. Coupling all of these facts together, it is apparent that the procedure in the instant case is suspect and the utilization of the photographic identification was improper.

After the trial was completed, and prior to the hearing on the Petitioner's post trial motions, the State tendered to the defense a police report which had not previously been disclosed. Petitioner's Exhibit 1 at the post trial hearing summarized certain identifications made by Brunson. The police report impeached Brunson's testimony that he had previously given concerning the sequence of identification and whom he identified.

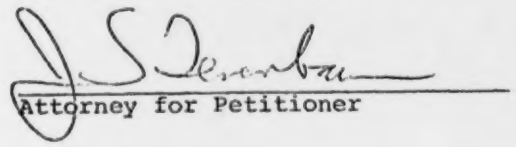
In Brady v. Maryland, 373 U.S. 83 (1963), the U.S. Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87.

In the instant case there can be no question that the report would have been helpful to the accused. At trial, Brunson testified that he made a photographic identification of the Petitioner. The photographs, however, were not available to the Petitioner for use in cross-examination or impeachment of the witness. It was not until after trial that the Petitioner and his counsel learned, despite repeated requests for police reports concerning the identification, that Brunson had been shown various pictures and had made tentative identifications of persons other than the Petitioner. This certainly would have impeached Brunson's testimony concerning his identification of the Petitioner, which was a crucial element in the determination of Petitioner's guilt. Thus, the identification by Brunson was further tainted by the failure to produce, at trial, the report and the refusal of the trial court to grant a new trial when the report was produced.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully prays that this Court issue its Writ of Certiorari to review the judgment of the Appellate Court of Illinois, First District.

Respectfully submitted,



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THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LEON MICHAEL DUNAGAN, Defendant-Appellant.	)))))))	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HONORABLE ROBERT J. COLLINS, PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

Defendant, Leon Dunagan, was charged with the murder of Oscar Tuson Boyd. After a jury trial in the circuit court of Cook County, he was found guilty of that crime and sentenced to a term of not less than 50 and not more than 100 years. The defendant asserts on appeal that (1) the trial court erred in refusing to quash the arrest of the defendant and suppress statements and evidence which were obtained as a result of defendant's alleged illegal arrest; (2) the trial court erred in failing to suppress the statement made by the defendant because his mother was not present; (3) the trial court erred in refusing to grant a new trial and in refusing to order the prosecution to correct erroneous testimony presented by two of the State's witnesses; (4) the photographic identification testified to by Brunson should have been suppressed; (5) the trial court erred in refusing to grant a new trial when after trial a police report was discovered that allegedly cast doubt on the photographic identification made by the State's witness; (6) the trial court erred in refusing to give instructions as to voluntary manslaughter, accomplice testimony, and in failing to provide a limiting instruction on Shaw's testimony; (7) the prosecutor's comments in closing argument regarding defendant's failure to testify constitute reversible error; (8) the court committed reversible error in calling John Shaw as a court's witness; (9) the trial court erred in excluding testimony concerning the identification and destruction of the murder weapon; and (10) the trial court improperly limited cross-examination of Shaw and certain other witnesses.

On December 26, 1971, Richard Brunson had been attending a reunion of his high school graduation class in the Jet Club at 62nd and Prairie Avenue, Chicago, Illinois. At approximately 10 p.m., Brunson left the reunion and walked to where he had parked his 1966 red Volkswagen. Brunson found that his car was not where he had parked it, and he returned to the Jet Club and spoke to Oscar Boyd. Then Brunson and Boyd, along with Mary Williams, Norma Statum and Barbara Abston, entered Boyd's 1970 two-door Cadillac. Oscar Boyd drove and the five headed west on 63rd Street.

At 63rd Street and Wabash Avenue, Richard Brunson saw his red Volkswagen heading south on Wabash toward 63rd Street. Oscar Boyd stopped his car and backed into the intersection of 63rd and Wabash, blocking the path of the Volkswagen. Brunson observed the presence of four teen-aged boys in the Volkswagen. As Boyd's Cadillac came to a halt, Brunson and Boyd alighted, as did the four occupants of the Volkswagen. Richard Brunson testified at the trial that he had seen the face of the driver of the Volkswagen that night and he identified him in court as the defendant, Leon Dunagan.

Brunson and Boyd ran from the Cadillac toward the fleeing youth. Brunson testified that the defendant, driver of the Volkswagen, had a gun in his hand and when Oscar Boyd, the deceased, shouted "Hey," the defendant shot Boyd. As Boyd went down, the defendant continued running and entered the housing project at 6215 South Wabash. The police came and they removed Oscar Boyd to Billings Hospital where he later died.

Police officer Melvin Duncan, after being assigned to the homicide of Oscar Boyd, saw Richard Brunson, Mary Williams, Norma Statum and Barbara Abston at Billings Hospital. After speaking with them, Duncan went to 63rd and Wabash to observe the scene of the offense. Other officers examined Brunson's Volkswagen for fingerprints, but were unable to find them either on the interior or exterior of the car because of the weather conditions. There

was testimony that it was very wet the evening of December 26.

There was testimony given that on the evening of December 28, 2 days following the homicide, Investigators Duncan and Wiley went to a gas station at 63rd and Wabash where they saw a group of people. All of the group fled when the officers approached except Reginald Brown, who accepted the request to enter the squad car and speak with the officers. Brown told them that he had heard who killed Oscar Boyd and he would be willing to give a statement to that effect.

At trial, there was a variation between what Officer Wiley remembered about the conversation with Brown and what Officer Duncan remembered. Duncan testified that he recalled talking with Brown on December 27, and he had no memory of a written transcript being taken of the conversation. Officer Wiley testified that he and Duncan spoke with Brown on December 28, and that a written statement had been taken from Brown. Wiley stated that he had misfiled Brown's statement among his own case materials and had not located it until after the trial had begun.

Officer Wiley testified that after speaking with Reginald Brown, he and Officer Duncan went to 6215 South Wabash, apartment 1002, at approximately 9 p.m. on December 28. This was the home of Leon Dunagan, the defendant. Upon arriving, the officers informed Mrs. Dunagan, Leon's mother, that they wanted to take Leon to their office and talk to him about a shooting. Mrs. Dunagan agreed, and they handcuffed the defendant and left the building. As they left the building, 15 to 20 sniper shots were fired at Dunagan, Officer Wiley and Officer Duncan. The three reached the squad car and proceeded to the police station where Officer Wiley discovered he had been shot. Investigator Duncan took the defendant into the building, cuffed him to a bracket, and took Wiley to the hospital.

When Officer Duncan returned to headquarters, he advised the

defendant of his constitutional rights, and the defendant told the officer that he would like to speak with his mother before he proceeded. The officer allowed Dunagan to use the telephone, at which time defendant placed two calls. After making the calls, defendant told the officer he had spoken with his mother and he wanted to talk about the shooting.

Officer Duncan testified the defendant stated that on the night of December 26, 1971, he received a car from Michael Harding and picked up John Shaw, James Massey and Dean Montgomery. After driving the car for awhile, they approached the intersection of 63rd and Wabash where a Cadillac backed up in front of the Volkswagen. Someone then jumped out of the Cadillac and the four in the Volkswagen got out of the car and began to run in a northeasterly direction. One of the persons in the Cadillac yelled "Halt," and the defendant became frightened, reached into his pocket, pulled out a pistol, turned and shot one time at the man saying halt. The defendant continued running until he reached the 10th floor at 6215 South Wabash. Defendant told Officer Duncan that he used a .38 automatic pistol and he threw it into the incinerator on the 12th floor of 6215 South Wabash.

Thereafter, Investigator Duncan called assistant State's Attorney Thomas J. Cullinan. When Mr. Cullinan arrived, he again advised defendant of his constitutional rights and asked him if he still wanted to give a statement. The defendant replied that he would give a statement. Cullinan called Claude Cole, a court reporter, who arrived shortly thereafter to take the statement. The defendant gave a statement to Mr. Cullinan in the presence of Investigator Duncan and Mr. Cole. There was some discrepancy in the testimony between what Investigator Duncan recalled about the statement and what Mr. Cole remembered. Officer Duncan testified that the statement was immediately typed by Mr. Cole and read to the defendant. However, Mr. Cole testified that the statement was typed later and was not read to the defendant in his presence. The

defendant never signed the statement.

At trial, James Massey, Dean Montgomery and John Shaw testified they had all been with defendant on December 26, 1971, riding around in the red Volkswagen. They also testified that the Cadillac had blocked their path and they all fled toward 6215 South Wabash. All three said they heard a shot, but none testified that he actually saw the defendant use the gun. James Massey testified that upon arriving at the Wabash building on the 10th floor he spoke with the defendant. He asked the defendant whether he had shot the man and the defendant said he thought the decedent was going to shoot him.

On the basis of the evidence, the jury found the defendant guilty of murder. Dunagan was sentenced to imprisonment for not less than 50 years and not more than 100 years.

Defendant's first contention on appeal is that the trial court erred in refusing to quash the arrest of the defendant and suppress statements and evidence obtained as a result of that arrest, which defendant contends was illegal. We reject that argument.

Defendant takes the position that the police officers based their arrest of defendant only on the statements made to them by an informant—someone whom they had not seen before nor received any information from prior to December 28, 1971. Defendant cites In re Woods (1974), 20 Ill. App. 3d 641, 314 N.E.2d 606, in which the court stated that a general description is insufficient to provide the probable cause which is necessary to justify an arrest unless it is supported by other relevant facts and circumstances known to the arresting officer.

Probable cause exists for an arrest when the facts and circumstances that the arresting officer has knowledge of are sufficient to warrant a person of reasonable caution in believing that an offense has been perpetrated and the person arrested has committed the

offense. People v. Robinson (1976), 62 Ill. 2d 273, 276, 342 N.E.2d 356, 358.

Whether probable cause exists in a certain case depends upon the totality of the facts and circumstances that the officer is aware of at the time of the arrest. People v. Glenn (1978), 63 Ill. App. 3d 344, 348, 380 N.E.2d 390, 393.

Defendant asserts in the instant case that probable cause for an arrest was lacking and relies on People v. Foster (Docket No. 78-208, November 28, 1978), ____ Ill. App. 3d ____, ____ N.E.2d ____ to substantiate his position. In Foster, the trial court found that there had been probable cause for the arrest of the defendant, but the appellate court reversed the decision. The appellate court held that the State's only evidence for justifying a finding of probable cause was an unknown informer believed defendant committed the offense and the defendant had been seen running across the street in the evening a week after the crime was committed. The court stated:

> "The law in Illinois is clear that an arresting officer may rely upon information supplied by an informer in determining whether probable cause exists 'if the reliability of the informant has been previously established or independently corroborated.'" (Foster, at ___.)

The court did not find the State had established that the informer was reliable, and evidence of the defendant running across the street a week later did not provide the necessary probable cause for arrest.

The Foster case is distinguishable from the instant case. Although there was an unknown informer, Reginald Brown, whom the police did not know nor had they ever obtained information from him previously, this was not the only basis for defendant's arrest. When the officers took the statement from Reginald Brown, they had already spoken with Richard Brunson and Barbara Abston who gave a

description of Oscar Boyd's assailant. The officers knew that there had been an automobile theft and a shooting and the persons involved had run to the building at 6215 South Wabash. They also knew the persons involved were in their teens. Brown told the officers that he had heard about a car being stolen, that there was a shooting, and that the offender was in his teens. All of this information was merely a corroboration of what the police had already obtained from Richard Brunson and Barbara Abston. The only information Brown supplied that was not corroborated was the name of the defendant and where he lived. Defendant lived at 6215 South Wabash—the same building where the witnesses said the assailant ran after the shooting.

It is clear from the facts in this case that the unknown informer's reliability was independently corroborated by the witnesses to the offense.

Defendant cites other cases, but they only possess one element, the unknown informer, which is not enough to provide probable cause for an arrest.

Since defendant's arrest was based on specific information from an informer, together with facts the arresting officers were already aware of, there was probable cause for the arrest of defendant. Therefore, the arrest was legal and all statements and evidence flowing from that arrest were properly admitted at trial.

Defendant next contends that the trial court erred in failing to suppress the statement made by him because his mother was not present. We disagree.

The facts indicate that defendant (who was 17 years of age at the time of the incident) was in police custody when he was first given the Miranda warnings. At that point, he asked the officer present whether he could telephone his mother. Defendant placed two phone calls and then told the officer he was ready to discuss

the shooting. He recounted the incident to the officer, after which the officer telephoned the assistant State's Attorney who arrived shortly thereafter. The attorney gave defendant his second Miranda warnings and asked about the presence of his mother. The defendant indicated that he had spoken with his mother that night and she had to go to work early the next morning. Defendant also stated that his mother told him she would do what she could the next day. The defendant then gave a statement which was recorded and read into evidence at the trial. The statement was never signed by defendant nor was the statement itself allowed into evidence. However, defendant contends that because his mother was not present during the questioning it became incumbent on the police to cease their questioning. We are not in accord with defendant's position.

Illinois courts have held that the failure to have a parent or guardian present during the questioning of a juvenile does not automatically render the statements made at that time inadmissible. In re Bizzle (1976), 36 Ill. App. 3d 321, 326, 343 N.E.2d 633, 638.

Determining whether a statement is voluntary depends on a totality of the circumstances. (In re Shutters (1977), 56 Ill. App. 3d 184, 186, 370 N.E.2d 1225, 1227.) The facts in this case would not render the statement of defendant inadmissible. The defendant was given Miranda warnings, was asked whether he wanted his mother present, and was given the opportunity to call his mother which he stated he had. After all this, defendant proceeded to give a statement about the shooting. In addition, the questioning was not subsequent to an extended period of custody or interrogation. There was no evidence of coercion or physical abuse in the record. In light of all these reasons, we find no error in the refusal of the trial court to suppress defendant's statement.

Defendant's third contention is that the trial court erred in refusing to grant a new trial and in refusing to order the prosecution to correct alleged erroneous testimony presented by Officer

Duncan and Mr. Brunson. The People maintain that there was no false testimony and it was impossible for the prosecutor to correct apparent inconsistencies in the testimony. The People also maintain that defendant was not prejudiced by the lack of such a correction in the testimony. We must agree with the People's position.

Defendant relies on Napue v. Illinois (1959), 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 for the basis of his argument. Napue stands for the proposition that the failure of the prosecutor to correct the testimony of the witness whose testimony he knew to be false denied the defendant due process of law in violation of the fourteenth amendment. The principles elicited in Napue require that the prosecution know that the testimony is false before it becomes incumbent on the prosecution to correct the testimony.

In the instant case, Officer Duncan and the court reporter, Claude Cole, differed in their recollection about the facts involving the taking of defendant's statement. Duncan testified that the defendant's written statement was immediately typed at the headquarters where defendant was detained and then was either read to defendant or read by the defendant. Cole testified that defendant's statement was not typed at headquarters but was taken by him to 26th and California, the criminal courts building, and typed there. Cole did not remember the statement being read in his presence. Neither Officer Duncan nor Claude Cole stated defendant signed the statement.

Richard Brunson testified that he saw pictures at 11th and State Streets, police headquarters, on December 27, 1971, but could not identify anyone as the killer of Oscar Boyd. A police report was introduced at the hearing on defendant's post-trial motion which stated that Brunson had looked at pictures all day and he "liked" Terrill Dunagan's picture and also "two look-alikes."

The defendant contends that it was the responsibility of the prosecutor to correct the alleged false statements made by Officer Duncan and Mr. Brunson. We disagree.

Brunson gave testimony which differed from a later-found police report, but it was not proved that the prosecutor was aware of the report during trial. Even if he had been aware of the report earlier, he could not be held responsible for Brunson's statements during the trial. Also, with regard to Duncan's and Cole's statements, both accounts were presented to the jury and contradictions in testimony such as these go to the weight of the evidence and do not indicate perjury. People v. Nuccio (1973), 54 Ill. 2d 39, 50, 294 N.E.2d 276, 282.

The Illinois cases cited by defendant are distinguishable from the instant case. They involve testimony known to be false by the prosecutor or his office. People v. McKinney (1964), 31 Ill. 2d 246, 201 N.E.2d 431; People v. Lueck (1962), 24 Ill. 2d 554, 182 N.E.2d 733.

In People v. Martin (1970), 46 Ill. 2d 565, 567-68, 264 N.E.2d 147, 148, the court held that where the falsity lies in the testimony of the law enforcement officer who gave favorable evidence to the prosecutor and despite the prosecuting attorney not being aware of the falsity, the prosecution is charged with knowledge of its agents which include the police. Although, it is alleged, Officer Duncan gave false testimony in regard to the statement of defendant, his testimony was not the only evidence on the issue and the jury was properly permitted to weigh the evidence in their own minds.

The testimony involved here only concerned inconsistencies in testimony, not known false statements, and it was not the responsibility of the prosecutor to correct those inconsistencies. For these reasons, the trial court did not commit error by refusing to

grant a new trial based on this contention.

Next, defendant contends that the trial court should have suppressed testimony of the photographic identification made by Richard Brunson. The State maintains on appeal that the evidence of the photographic identification was properly admitted since the identification procedure used did not lead to a substantial likelihood of irreparable misidentification. We agree that the trial court correctly admitted the photographic identification.

In considering whether a pre-trial identification by photograph will be set aside after an eyewitness identification at trial, the court will only do so "* * * if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. U.S. (1968), 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 1253, 88 S. Ct. 967, 971.

To determine whether such a misidentification has occurred, the court will look at certain circumstances, the opportunity of the witness to view the offender at the time of the crime, the accuracy of the witness' prior description of the offender, the witness' degree of attention, the certainty of the identification, and the length of time between the crime and the confrontation. (Neil v. Biggers (1972), 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 411, 93 S. Ct. 375, 382.) In view of these criteria, we cannot agree with defendant's position in the present case.

At the time of the offense, Richard Brunson testified that he had the chance to see defendant when he was approximately 10 to 20 feet from him while defendant was in the Volkswagen. The witness Brunson also gave a fairly accurate description of the defendant prior to viewing the photographs, and there was a period of only 2 or 3 days after the crime that he picked out defendant's photograph.

We do agree with defendant when he states that the utilization of a photograph is not desirable when the suspect is in custody and a line-up would be possible. (People v. Holiday (1970), 47 Ill. 2d 300, 307, 265 N.E.2d 634, 637.) However, we cannot conclude that weighing all the factors in this case it gave rise to a substantial liklihood of irreparable misidentification, since Brunson had observed the defendant on the night of the offense.

As defendant's next contention, he asserts that the trial court erred in refusing to grant a new trial when after the trial a police report was discovered concerning statements made by a witness. The State maintains that the police report did not contradict Mr. Brunson's testimony and therefore disclosure to the defendant was not required.

The court did not commit error in refusing to grant a new trial based on the discovery of a police report after the trial. Defendant states that this issue is in accord with Brady v. Maryland (1963), 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218, 83 S. Ct. 1194, 1196-97, which stands for the principle that suppression by the prosecution of evidence favorable to an accused upon request violated due process where such evidence is material either to guilt or punishment. The supreme court also states that this is irrespective of the good or bad faith of the prosecution.

We do not disagree with the principle enunciated in Brady, but we cannot agree with defendant's use of it in the present case.

The police report that was withheld stated that on December 28, 1971, Richard Brunson looked at pictures the entire day, and he picked three pictures. The report stated he "likes Terrill Dunagan" and he "Picked two look-alikes." This report was brought to the attention of the court for the first time on defendant's post-trial motion.

The witness testified during the trial that he viewed

photographs in police headquarters at 11th and State on December 27, 1971, but could not identify Oscar Boyd's assailant.

The report does not impeach Brunson's testimony concerning his identification of the defendant. Brunson testified that he did not identify any photographs when he went to the police station. Even though the police report stated he "likes" someone and picked two "look-alikes" does not make the report inconsistent with Brunson's testimony. These statements were not material to the guilt or punishment of the accused, nor was the evidence favorable to defendant. Brunson had given a description of defendant prior to viewing the photographs, and the record indicates that several other people testified that the driver of the Volkswagen was the man who fired the shot. The police report was not a material factor in determining defendant's guilt, and a new trial should not have been granted on that basis.

Next, defendant argues that the trial court erred when it failed to give jury instructions on voluntary manslaughter and accomplice testimony, and an instruction limiting the purposes for which John Shaw's testimony could be used. The State maintains that there was no evidence to support instructions on voluntary manslaughter and accomplice testimony. The State also maintains that the omission of an instruction on John Shaw's testimony was not error.

It is well settled that if evidence exists in the record which would reduce the crime to a lesser included offense if believed by a jury, the defendant has a right to an instruction and form of verdict defining the lesser included offense. (People v. Simpson (1978), 57 Ill. App. 3d 442, 445, 373 N.E.2d 809, 811.) It is also well established that such an instruction should not be given if the evidence clearly shows that the crime was murder and no evidence exists to support a conviction of manslaughter. People v. Handley (1972), 51 Ill. 2d 229, 235, 282 N.E.2d 131, 136.

Serious provocation by the deceased is necessary to reduce the crime from murder to voluntary manslaughter, and the only types of provocation recognized as serious enough require more than mere words, gestures or trespass to property. (People v. Free (1976), 37 Ill. App. 3d 1050, 1052, 347 N.E.2d 505, 507.) Such serious provocation did not exist in the instant case. The most provocative action on the deceased's part was the shouting to defendant "Hey." The provocation on the part of the deceased was so lacking to justify such an attack that there could not have been an instruction for voluntary manslaughter, and the trial court was correct in its denial.

Defendant claims that the trial court erred in not allowing an accomplice instruction. We disagree. The instruction is properly refused when there is no evidence that the witness is an accomplice in the crime. An accomplice has generally been defined as one who could himself have been indicted for the crime as either a principal or accessory. People v. Drysdale (1977), 51 Ill. App. 3d 667, 673, 366 N.E.2d 394, 398.

Apparently, from defendant's brief he wanted the three youths who were in the Volkswagen to have been considered defendant's accomplices. The evidence is devoid of any facts or circumstances which would make any of them guilty of the murder as a principal or an accomplice. The trial court was correct in denying the instruction. Defendant also contends that a limiting instruction should have been given on John Shaw's testimony. The defendant does not state in his brief for what purpose Shaw's testimony should have been limited nor what type of instruction should have been given.

The trial court, when giving the jury instructions, did include that evidence received for a limited purpose should not be considered for any other purpose.

We agree with the State that the trial court properly omitted

all of the jury instructions which the defendant now asserts should have been given.

Defendant urges that the prosecutor made comments in his closing argument on defendant's failure to testify. The State maintains that the prosecutor was not referring to the failure of defendant to testify when he stated the evidence was uncontradicted; but he was merely making an accurate summary of the evidence. We agree with the prosecution.

The Federal constitution and the statute both forbid the court and the prosecutor from making any direct reference to a defendant's failure to testify. People v. Hopkins (1972), 52 Ill. 2d 1, 6, 284 N.E.2d 283, 285.

However, the prosecutor may refer to the fact that the testimony of the State's witnesses is uncontradicted, even though the defendant would be the only person who could contradict the evidence. People v. Cook (1975), 31 Ill. App. 3d 363, 366, 334 N.E.2d 834, 836.

Defendant refers to People v. Blissitt (1973), 12 Ill. App. 3d 551, 554, 299 N.E.2d 562, 564, where they cite the standard for determining the propriety of closing arguments, as whether the reference in closing argument was intended or calculated to direct the attention of the jury to defendant's failure to testify. In applying this standard to our facts, we cannot find that the statements made by the prosecutor were improper. There was no apparent intention to draw the jury's attention to the defendant's failure to testify, and the court therefore committed no reversible error.

Defendant next contends that the court committed reversible error in calling John Shaw as a court's witness. The State maintains that it could not vouch for Shaw's veracity, and his testimony was relative to direct issues in the case so it was proper to

call him as a court's witness.

Where the formal rules might cause a failure to bring the truth to the trier of the facts, Illinois courts are more willing to allow the trial judge to call a person as a court's witness. People v. DeFord (1978), 59 Ill. App. 3d 942, 944, 376 N.E.2d 97, 99.

There were important factors before the trial court which supported the State's hesitancy in vouching for the veracity of John Shaw. Shaw had given a signed statement to the police which said that he saw the defendant fire a shot on the evening of December 26, 1971. When the State called him to testify, he said he had not been near the scene of the shooting on that evening nor had he seen defendant fire a shot. At one point in the examination of Mr. Shaw by the prosecution, he denied giving the response attributed to him in the statement regarding defendant's firing of the shot. It is clear from the contradictory nature of Shaw's statements that the State could not vouch for his veracity, and it was necessary to call him as a court's witness to elicit the truth from him.

The defendant cites People v. Bailey (1975), 60 Ill. 2d 37, 322 N.E.2d 804 as controlling in the present case. We disagree. In Bailey, the court held that using prior inconsistent statements of a witness can only be used for impeachment purposes and not as substantive evidence. But, the reason Bailey was reversed was not because the witness was questioned concerning his prior statements, but because the State attempted to impart a substantive character to such prior statements.

In the present case, there was no effort to treat Shaw's prior statement as substantive evidence. John Shaw directly contradicted his prior statements when he was on the witness stand. Such a change in his position caused the State to question his veracity

as a State's witness and, under the circumstances, the court was correct in calling Shaw as a court's witness.

As defendant's next contention, he states that the trial court committed error by excluding testimony concerning the murder weapon, the circumstances under which the weapon was recovered, and how it was subsequently destroyed.

During the trial, the prosecution attempted to introduce testimony to the jury that related to the identification and destruction of the murder weapon. The defendant objected to this testimony being allowed and the court sustained his objection based on the fact that defendant was not able to perform his own tests with the gun since it had been destroyed.

When the defendant attempted to offer the same evidence in his case-in-chief, the court sustained the prosecution's objection and stated the evidence could not be introduced unless the defendant withdrew his earlier objection. The defendant would not withdraw his objection and the evidence was excluded. We do not believe that if any error was committed it reasonably affected the result of the trial. We do think that the test enunciated in People v. Oliver (1972), 3 Ill. App. 3d 872, 878, 279 N.E.2d 363, 367 is the appropriate rule. The court stated that it was not the policy of the court to reverse a decision because error had been committed unless it appears that real justice has been denied or a finding of guilty may have resulted from such error.

In the instant case, it was not shown that such an exclusion caused the finding of guilty. The testimony in this case was overwhelmingly against the defendant. As stated earlier, there were several witnesses who gave testimony that implicated defendant in the crime. The defendant contends that had this testimony been allowed it would have cast doubt on the reliability of the statement made by him relating to the disposition of the gun. This

would not have been the case due to defendant's own admissions about the crime. We do not believe that based on the foregoing such an error, if any, was a denial by the trial court of "real justice" to the defendant.

As his final contention, defendant argues that the trial court limited cross-examination of John Shaw and other witnesses. The People maintain that the trial court acted within its discretion in sustaining objections made by the People.

The trial court may use its discretion in determining the latitude that is to be enjoyed by the attorneys during cross-examination of witnesses. Only where there is a clear abuse of discretion which results in manifest prejudice to defendant will a reviewing court interfere. People v. DeSavieu (1973), 14 Ill. App. 3d 912, 919-20, 303 N.E.2d 782, 789.

We have found that in reviewing the record no prejudice occurred to defendant due to the limiting of cross-examination of the State's witnesses. The defendant cites several objections made during his cross-examination, the first of which was defendant's attempts to ascertain whether John Shaw was on furlough from a juvenile institution. He relies on People v. York (1975), 29 Ill. App. 3d 113, 329 N.E.2d 845 which held that the record of juvenile proceedings is discoverable and admissible to show bias of the witness as a result of leniency. This does not apply to our present case. There was no indication by defense counsel that he had any knowledge of threats or promises made to Mr. Shaw to show bias. The trial court stated that there were appropriate ways to bring up a prior record, but because defense counsel lacked a sufficient basis the court sustained the State's objection. We do not think the trial court abused its discretion by sustaining the objection made by the State.

The defendant cites several other instances in his brief where

the trial court allegedly improperly sustained counsel's objections. We do not need to go into the other objections that defendant alleges were made at trial. We have made a thorough review of the record and find that the trial court did not abuse its discretion in sustaining the objections.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

JIGANTI, P.J., and ROMITI, J., concur.

52125

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 1, 1979

Mr. J. Samuel Tenenbaum
Attorney at Law
208 S. LaSalle St., Suite 2000
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No. 52125 - People State of Illinois, respondent, vs. Leon Michael Dunagan, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX
B

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE UNITED STATES
FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

APPENDIX
C

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ILLINOIS REVISED STATUTES
CHAPTER 38

§107-1. Definitions

a) A "warrant of arrest" is a written order from a court directed to a peace officer, or to some other person specifically named, commanding him to arrest a person.

b) A "summons" is a written order issued by a court which commands a person to appear before a court at a stated time and place.

c) A "notice to appear" is a written request issued by a peace officer that a person appear before a court at a stated time and place.

§107-2. Arrest by Peace Officer

A peace officer may arrest a person when:

a) He has a warrant commanding that such person be arrested;

b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or

c) He has reasonable grounds to believe that the person is committing or has committed an offense.

NO. 79-5853

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
MAR 10 1980
MICHAEL RODAK, JR., CLERK

LEON DUNAGAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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NO. 79-5853

IN THE
SUPREME COURT OF THE UNITED STATES

LEON DUNAGAN,
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vs.
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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant his Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the police had sufficient probable cause to arrest petitioner in his apartment, when they based their entry and arrest on a written statement obtained from a private citizen who had no reason to lie and whose statement was substantially corroborated by facts already revealed to the police?

II. Whether the evidence obtained subsequent to a lawful arrest is properly admissible at trial?

III. Whether it is proper to admit into evidence statements which are voluntary and obtained according to Miranda; and whether testimony of a witness regarding photographic identification of petitioner is properly admitted when the totality of the circumstances surrounding the identification does not give rise to a substantial likelihood of irreperable misidentification.

STATEMENT OF FACTS

Respondent wishes to add the following to petitioner's statement of facts. On December 26, 1971, Oscar Boyd was shot to death at the intersection of 63rd Street and Wabash Avenue. The petitioner, Leon Dunagan, was later arrested and indicted for murder. At a jury trial petitioner was found guilty of murder and sentenced for a term of from 50 to 100 years.

Richard Brunson had been attending a reunion of his high school class on the evening of December 26, 1971. Around 10:00 p.m. Brunson left the reunion and walked to where he had parked his red 1966 Volkswagen automobile. (R. 193) Upon discovering that his car was gone, Brunson returned to the party where he talked with Oscar Boyd. (R. 193) Then Brunson and Boyd, along with Barbara Abston, Norma Statum and Mary Williams, entered Boyd's Cadillac (R. 66, 129, 195) and headed west on 63rd Street. (R. 67, 129-131, 195)

At 63rd and Wabash Richard Brunson spotted his Volkswagen heading south on Wabash. (R. 196) After Brunson told his companions that he saw his car, Oscar Boyd stopped his car and backed it into the intersection of 63rd and Wabash thus blocking the path of the Volkswagon. (R. 70, 133, 197) As Boyd was backing into the intersection, Brunson observed four teen-aged blacks in the Volkswagen. (R. 197-198) He noted especially the face and upper torso of the driver. (R. 198)

As Boyd's Cadillac came to a halt, Brunson and Boyd alighted, as did the four occupants of the Volkswagen. (R 71-72, 134-135, 199) Barbara Abston and Richard Brunson saw the driver of the Volkswagen at this time, and they described him at trial as a male Negro approximately 6 feet tall, of medium build and with a medium brown complexion. He was wearing a dark leather coat or jacket, which appeared to Brunson to be brown in color, and a knit cap with a ball on the top. (R. 72, 200) Brunson also observed that the man had a chrome colored gun in his right hand as he got out of the Volkswagen. (R. 200, 349-350) At trial, Richard Brunson

identified the defendant, Leon Dunagan, as the driver of the red Volkswagen. (R. 201)

Immediately upon alighting from the Volkswagen, the four youths ran northeasterly in the direction of a housing project located at 6215 South Wabash. (R. 73, 135, 202) Meanwhile, Brunson and Boyd ran from the Cadillac toward the fleeing men. Oscar Boyd shouted, "Hey," as the petitioner was running north on the eastern sidewalk of Wabash. (R. 74, 201) At this time, the petitioner stopped turned around and raised his right arm. (R. 74, 203) Mary Williams, who was still in the front seat of the Cadillac, said to the other women, "Get down. He has a gun." (R. 75) Brunson testified that, at this time, the petitioner "briefly aimed and fired." (R 203) Brunson, Barbara Abston and Norma Tatum all heard a gunshot and saw Oscar Boyd fall to the pavement. (R. 75, 137, 203). As Boyd went down, the petitioner continued running and entered the housing project. (R. 204)

On the evening of December 28th, two days following the homicide, Investigator Duncan and his partner, Claude Wiley, went to a gasoline station at 63rd and Wabash where they saw one Reginald Brown with two or three other persons. (R. 811-812) Brown's companions fled when the officers approached, but Brown accepted an invitation to enter the squad car, and there he spoke with the officers. (R. 407, 813) The three drove to a Yellow Cab Company parking lot where Brown said that he had heard who had killed Oscar Boyd and that he would give a statement to that effect. (R. 815) In a written statement given that evening, Brown said that one Toby Harris told him that the petitioner had shot Oscar Boyd. (R. 871)

At trial, there was a discrepancy between what Investigator Duncan remembered about the conversation with Brown and what Investigator Wiley recalled. Duncan testified on cross-examination that he remembered talking with Brown on December 27th and that no written memorandum was made of the conversation. (R. 478, 493) Wiley later testifed, on the other hand, that he and Duncan spoke with Brown on December 28th (R 811, 1142), and that Wiley had a copy of Brown's written statement which had been misfiled among the officer's own case materials. (R. 734, 1144)

After speaking with Reginald Brown, Investigators Duncan and Wiley went to apartment 1002 in the housing project at 6215 South Wabash at approximately 9:00 p.m. on December 28th. (R. 406, 409) When the petitioner opened the door, the officers identified themselves and entered the apartment where they also saw the petitioner's mother and a young lady approximately 20 years old. (R. 406-407) The policemen informed Mrs. Dunagan that they wanted to take the petitioner to their office and speak to him about a shooting. (R. 407) Mrs. Dunagan agreed to allow her son to accompnay the officers. (R. 407)

As the petitioner and the two investigators were walking from the building to the officers' car, 15 to 20 sniper shots were fired at them from the building. (R. 408, 971-972) The three reached the squad car however, and proceeded to Area 2 homicide headquarters where Officer Wiley discovered that he had been shot (R. 409). Investigator Duncan took the petitioner into the headquarters building and then brought Wiley to the hospital. (R. 409).

At approximately 9:30 p.m. Investigator Duncan returned to Area 2 headquarters and began talking with the defendant. (R. 410) He first advised the petitioner of his constitutional rights (R. 410-411), after which the defendant said he wanted to talk to his mother before answering any questions. (R. 412) Duncan allowed the petitioner to use a telephone, and the petitioner, after making two phone calls, said he had talked with his mother and now wanted to talk about the shooting. (R. 412)

The petitioner told Investigator Duncan that, on the night of December 26, 1971, he received a car from one Michael Harding and then picked up John Shaw, Dean Montgomery, and James Massey. (R. 414) AFter driving through several southern suburbs, the four returned to the city where Massey asked to be let out at 63rd and Wabash. (R. 414) As they were approaching that intersection, a Cadillac backed up

in front of the Volkswagen they were in. The four youths began running to the northeast when one of the persons from the Cadillac cried out "Halt." The petitioner reached into his pocket and pulled out a .38 caliber automatic pistol which he fired once at the person who had called "Halt." (R. 414-415) The petitioner continued running until he reached the tenth floor of the building at 6215 South Wabash where he disposed of his weapon in an incinerator. (R. 416)

Investigator Duncan called Assistant State's Attorney Thomas J. Cullinan, at approximately 1:00 a.m. on December 29, 1971. (R. 947) Mr. Cullinan arrived at Area 2 headquarters, and, after informing the petitioner of his constitutional rights, he asked the petitioner if he wanted to give a statement. The petitioner replied that he did. (R. 948). Cullinan offered the petitioner coffee and a sandwich, and then asked the petitioner his age. When the petitioner replied that he was 17, Mr. Cullinan asked the petitioner if he wanted his mother present. The petitioner responded that he had talked to his mother earlier, that she had to go to work early in the morning, and that he did not want to bother her anymore. (R. 950)

The Assistant State's Attorney called Claude Cole, a court reporter, who arrived at the police station at approximately 3:00 a.m. (R. 951, 1118) At 3:35 a.m. the petitioner gave a statement to Mr. Cullinan in the presence of Investigator Duncan and Claud Cole, (R. C60-C69, 418, 951, 1119) Investigator Cuncan testified that this statement was immediately typed by Mr. Cole and read to the petitioner by Mr. Cullinan. (R. 419, 424) Claud Cole testified, however, that the statement was typed later and was not read to the petitioner in Cole's presence. (R. 1121) The petitioner did not sign the statement. (R. C69, 424, 1006)

During the trial there was testimony from Richard Brunson that on December 27, 1971, he went to police headquarters at 11th and State where he viewed three books of photographs but made no identification. (R. 274, 278) Two or three days after the shooting, Brunson viewed photographs at Area 2 headquarters and identified a picture of the defendant. (R. 275) Brunson did not remember any of the officers who showed him photographs, and testified that he never again saw the officers. (R. 212, 287) Brunson testified also that the picture he identified at Area 2 headquarters was the same picture taken by court reporter, Claude Cole, at the time the petitioner gave his statement. (R. 307-308)

During the course of a hearing on the petitioner's post-trial motion, a police report, dated December 28, 1971 and signed by Officer Alex McCrae, was introduced for the first time. (R. 1450) This report indicated that Richard Brunson "looked at pictures all day," that he "likes" Terrill Dunagan, and that he picked out "two look alikes." (R. 1450-1451)

The Illinois Appellate Court, First District, in affirming petitioner's conviction of murder found on the facts that the police officers had probably cause to enter petitioner's apartment and arrest him without a warrant; that petitioner's statement to the police was voluntary; and that under the totality of the circumstances witness Brunson's photographic identification of petitioner did not give rise to a substantial likelihood of irreperable misidentification.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE POLICE HAD PROBABLE CAUSE TO ENTER PETITIONER'S APARTMENT AND ARREST HIM ON A MURDER CHARGE, AS THEY RELIED ON INFORMATION GIVEN TO THEM BY A PRIVATE CITIZEN WHO HAD NO REASON TO LIE AND WHO WAS SUBSTANTIALLY CORROBORATED BY FACTS ALREADY REVEALED TO THE POLICE.

The petitioner maintains that it was illegal for the officers to arrest petitioner in his apartment without an arrest warrant. However, neither the Illinois statutes nor case law requires an arrest warrant when there is probable cause that the arrestee had committed an offense. Ill. Rev. Stat. 1971, Sec. 107-2(c), empowers an officer to arrest when he "has reasonable grounds to believe that the person is committing or has committed an offense." Similarly, the Illinois Supreme Court has approved of a warrantless arrest of a person in his apartment when probable cause exists. People v. Johnson, 45 Ill.2d 283, 259 N.E.2d 57)1970).

Where a statute authorizes arrest upon probable cause, as does section 107-2(c), an arrest made under such statute is not invalid because of a failure to obtain an arrest warrant. U.S. v. Watson, 423, U.S. 411, 96 S.Ct. 820 (1976); Cf. U.S. v. Santana, 427 U.S. 38, 96 S.Ct. 2406 (1976). The fact that police may have had time to obtain an arrest warrant is immaterial. This Court said in U.S. v. Watson, 423 U.S. 411, 96 S.Ct. 820 at 824, "The necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one but whether there was probable cause for the arrest." Thus, the issue in this Petition is whether there was probable cause to make the arrest.

There is no single factor which establishes whether or not probable cause exists. Rather, "whether or not probable cause for an arrest exists in a particular case depends upon the totality of the facts and circumstances known to the officers when the arrest was made." People v. Clay, 55 Ill.2d 501, 504, 304 N.E.2d 280, 282 (1973). In the present case, the arresting officers knew that an offense had been committed, and they had reasonable grounds to believe that petitioner had committed that offense.

At the time the officers took a statement from Reginald Brown, they had already spoken to Richard Brunson and Barbara Abston, both of whom were able to describe the man who shot Oscar Boyd. The officers knew that there had been an automobile theft and a shooting and that the assailant ran to the building at 6215 South Wabash. Reginald Brown's reliability was strengthened by the fact that he corroborated everything that the officers already knew. Brown said that there was a shooting, that a stolen car was involved in the shooting, and the offender was 16 or 17 years old. (R. 825-826) The only uncorroborated information supplied by Brown was the petitioner's name and the fact that the petitioner lived in apartment 1002 at 6215 South Wabash, the same building which witnesses saw the offender run to after the shooting. (R. 817, 825-826)

The fact that the prior reliability of Reginald Brown had not been established is insignificant since Brown was not a paid informer. "The usual requirement of prior reliability which must be met when police act on information from professional informers does not apply to information supplied by private citizens." People v. Kaprelian, 6 Ill. App.3d 1066, 1072, 286 N.E.2d 613, 618 (1st Dist. 1972). In this case, it clear from the facts that the unknown informer's reliability was independently corroborated by the witnesses to the offense.

In deciding the question of probable cause in a particular case the courts deal with probabilities and are not disposed to be unduly technical. These probabilities are the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959).

In People v. Clay, supra, the Illinois Supreme Court held, at 304 N.E.2d 282, the informant's information was corroborated by the statements of the witnesses to the crime. Such independent corrobration of an informer's information is sufficient to establish probable cause to arrest a suspect.

The federal courts are in full accord with the Illinois courts in holding that probable cause exists for a warrantless arrest based upon an informer's tip when it is shown that the informer is reliable or the information is corroborated by facts either presently known to the police or revealed to them in subsequent investigations instigated by the tip. U.S. v. Gonzalez, 555 F.2d 308 (2d Cir. 1977); U.S. v. Worthington, 544 F.2d 1275, (5th Cir. 1977), rehearing denied 548 F.2d 356 (1977); U.S. v. Jackson, 533 F.2d 314 (6th Cir. 1976).

Petitioner also claims that the arrest was illegal because Brown's information was based on hearsay. It is not material that the information given to the police was based on hearsay. What is significant is that there was a substantial basis for crediting the hearsay. People v. Williams, 27 Ill.2d 542, 544, 190 N.E.2d 303, 304 (1963). Brown's information was credible because it was corroborated by what the officers already knew. Furthermore, the informer's reliability was enhanced by the fact that he gave a signed statement rather than an anonymous oral tip. See, Draper v. U.S., supra.

In view of the foregoing, the petitioner's contention that his arrest was illegal is without basis in either fact law and should be dismissed.

II.

EVIDENCE OBTAINED SUBSEQUENT TO A LAWFUL ARREST IS ADMISSIBLE AT TRIAL, AND, EVEN IF THE ARREST WAS UNLAWFUL, THE SUBSEQUENT EVIDENCE WAS PURGED OF ANY ILLEGALITY.

Petitioner claims that "but for" the illegal arrest and seizure, his coat, identification by Brunson, and statements to the police would never have been obtained and admitted into evidence at trial.

Even if petitioner's arrest was illegal, it does not follow that all evidence obtained subsequent to the arrest, including confessions and identifications, is inadmissible. Decisions of the Illinois courts and of this Court all indicate that the taint contributed by the initial illegal arrest can be purged from subsequent evidence by factors which weaken the relationship between the arrest and later-acquired evidence. The proper method of determining admissibility of evidence obtained subsequent to an illegal arrest involves a consideration of several factors affecting the relationship between the arrest and the questioned evidence. One factor to be considered is whether the evidence comes about by an exploitation of the illegality in the arrest. People v. Pettis, 12 Ill. App.3d 123, 298 N.E.2d 372 (1st Dist. 1973). Three other factore were listed in Brown v. Illinois, 422 U.S. 590, 603, 95 S.Ct. 2254 (1975), where the admissibility of a confession following an illegal arrest was at issue. "the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant."

The rule proffered by the petitioner is "but for" test, i.e., if the evidence would not have come to light but for the illegal arrest, the evidence should be excluded. The "but for" rule has been explicitly rejected by both Illinois Courts and the United States Supreme Court. People v. Pettis, supra, 12 Ill. App.3d 123, 126, 298 N.E.2d 372, 374; Brown v. Illinois, supra, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261.

In the present case, a consideration of all the relevant factors indicates that, even if the petitioner's arrest were unlawful, the evidence which the petitioner contends was improperly admitted was actually free from any taint of illegality. Any illegality in the arrest was neither flagrant nor exploited, and there were intervening circumstances between the arrest and the questioned evidence. The petitioner's statement in the present case was given away from the scene of the arrest and only after repeated Miranda warnings and two telephone calls by the petitioner.

Even further removed from the arrest were the identification by Richard Brunson. The arrest was not made for the purpose of obtaining a photographic identification of the petitioenr. The identification was only incidently related to the arrest.

Since the petitioner's arrest was based on specific information from a private citizen, whose credibility was enhanced by corrobaration from facts which the arresting officers already knew, the arrest was with probable cause. Even if the arrest were illegal, however, the relation between it and subsequent evidence was so attenuated that the evidence was purged of any taint of illegality.

In view of the foregoing, the petitioner's contention that this evidence was tainted as being the fruits of an unlawful arrest is without merit and should be dismissed.

III.

PETITIONER'S STATEMENT WAS VOLUNTARY AND, ALSO, WAS OBATINED ACCORDING TO MIRANDA; AND, TESTIMONY REGARDING A WITNESS'S PHOTOGRAPHIC IDENTIFICATION OF PETITIONR WAS PROPERLY ADMITTED WHERE THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE IDENTIFICATION DID NOT GIVE RISE TO A SUBSTANTIAL LIKELIHOOD OF IRREPERABLE MISIDENTIFICATION.

A. Petitioner's Statements To Police

Petitioner claims that his statement to the police were involuntary because he was a juvenile and was entitled to have his mother presnet during the questioning.

When Investigators Duncan and Wiley entered the petitioner's apartment at 9:00 p.m. on December 28, 1971, the petitioner's mother agreed to allow them to take the petitioner to their office for questioning. (R. 407) At Area 2 headquarters Investigator Duncan informed the petitioner of his Miranda rights and asked the petitioner if he wished to discuss the shooting (R. 411). The petitioer was 17 years old at the time (R. 950, 964), replied that he first wanted to speak with his mother, and Duncan permitted him to use a telephone. (R. 412) After making two telephone calls, the petitioner said that he had talked to his mother and that he wanted to talk about the shooting. (R. 412) The petitioner then gave Investigator Duncan an oral account of the shooting. (R. 413-416)

Assistant State's Attorney, Thomas J. Cullinan, began taking a statement from the petitioner at approximately 3:30 a.m. on December 29th. (R. 1119) After informing the petitioner of his Miranda rights, Cullinan asked about the presence of the petitioner's mother. The petitioner indicated that he had spoken with his mother that night and that his mother would "take care of anything she could" the next morning. (R. 964) The petitioner proceeded to give a statement which was recorded by a court reported and read into evidence at trial (R. 964-974). The written, unsigned statement itself was not allowed into evidence. (R. 1303)

A consideration of the record shows that at the time he gave his statement, the petitioner waived any right he may have had to have his mother present. The petitioner told Investigator Duncan that he had spoken to his mother and still wanted to talk about the shooting. (R. 412) Later, the Assistant State's Attorney asked the petitioner if his mother wished to be present. The petitioner's only response was that his mother had to be at work early in the morning and that she would come later during the day (R. 964). The petitioner never asked that the interrogation be postponed until his mother arrived and never hesitated to speak without his mother present. Therefore, he should not now be allowed to assert that his statement was involuntary on these grounds.

Furthermore, Illinois courts have stated that a statement of a minor is not rendered inadmissible by a failure to have a parent present or even by the failure to notify a parent that the minor is in custody. In re Bizzle, 36 Ill. App.3d 321, 343 N.E.2d 633 (1st Dist. 1976); and People v. Murphy, 17 Ill. App.3d 477, 308 N.E.2d 235 (1st Dist. 1974). Rather, the proper procedure to determine the voluntariness of a statemetnt is to consider the totality of all the relevant circumstances. In re Lamb, 61 Ill.2d 383, 388, 336 N.E.2d 753, 756 (1975). In the present case, the petitioner was given repeated Miranda warnings, and he said that he understood them. He was offered coffee and a sandwich (R949), was allowed to make telephone calls, was asked about the presence of his mother, and was not mistreated. The petitioner's claim that his statement was inconsistent with the known facts is groundless. On the contrary, the statement is substantially

corroborated by all the witnesses to the shooting.

The record indicates that the petitioner never asked that his mother be present, that the petitioner never suggested that questioning should cease, and that the statement was given voluntarily.

B. Photographic Identification Of Petitioner

Petitioner contends that the trial court erred in allowing an impermissibly suggestive identifcation procedure of petitioner into evidence.

Richard Brunson testified, over defense objection, that he viewed three books of photographs in police headquarters on December 27, 1971 (R. 274). He stated that he was unable to identify anyone in those pictures as the slayer of Oscar Boyd. (R. 274) Two or three days after the offense, Brusnon viewed photographs at Area 2 headquarters and identified the petitioner's picture (R. 275, 286). At trial Brunson testified that People's exhibit No. 6, the photograph of the defendant taken by the court reporter on December 29, 1971, was the picture which he identiifed at Area 2 headquarters (R. 308). None of the police officers who testified was able to recall showing photographs to Richard Brunson (R. 249, 1090, 1148), and Mr. Brunson could not recall which officer showed him photographs. (R. 287)

A pre-trail idenfification will be set aside only if the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). In evaluating the likelihood of misidentification, courts will consider such factors as the witness's original opportunity to view the offender, the accuracy of the witness's description of the criminal, the certaintity of the identication, and length of time between the crime and the idenfication. Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). Furthermore, the burden is on the defendant to show that the identification procedure was suggestive. People v. Jackson, 12 Ill. App.3d 789, 793, 299 N.E.2d 142, 144 (1st Dist. 1973).

Even if testimony of Mr. Brunson's photographic identification was errounecusly admitted, such error was certainly harmless beyond a reasonable doubt. Where other competent evidence establishes the guilt of the defendant beyond a reasonable doubt, the verdict must be affirmed. People v. Watkins, 34 Ill. App.3d 369, 374, 340 N.E.2d 92, 97 (1st Dist. 1975). Any error in the identifcation procedure is harmless beyond a reasonable doubt when the petitioner has given a statement admitting his involvement or when there is othere competent identification testimony. People v. Prim, 53 Ill.2d 62, 70, 289 N.E.2d 601, 606 (1972); People v. Franklin, 41 Ill. App.3d 637, 640 354 N.E.2d 593 595 (1st Dist. 1976).

The trial court did not error in refusing to grant a new trial based on the discovery of a police report after the trial. Petitioner states that this issue is in accord with Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), which stands for the principle that suppression by the prosecution of evidence favorable to the accused upon request violated due process where such evidence is material either to guilt or punishment.

The police report that was withheld stated that on December 28, 1971, Brunson looked at pictures the entire day, and he picked three pictures. He liked the picture of Terril Dunagan and also picked two look-alikes.

Brunson testified during the trial that he viewed photographs in police headquarters on December 27, 1971, but could not identify Boyd's assailant.

The report does not impeach Brunson's testimony concerning his identification of petitioner. Brunson testified that he did not identify any photographs when he went to the police station. Even though the police report stated that he "likes" someone and picked two "look-alikes" does not make the report inconsistent with Brunson's testimony. These statements were not material to the guilt or innocence of petitioner, nor was the evidence favorable to him. Brunson had given a description of petitioner prior to looking at the photographs, and the record indicates that several other people testified that the driver of the Volkswagen was the man

who fired the shot. The police report was not a material factor in determining petitioner's guilt and therefore was not a ground for a new trial.

C O N C L U S I O N

For the foregoing reasons respondent respectfully prays this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

LEON DUNAGAN,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

N O T I C E

TO: J. Samuel Tenenbaum
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PLEASE TAKE NOTICE that on March 6, 1980, I have filed with the Clerk of the United States Supreme Court ten (10) copies of the attached Brief in Opposition to the Petition for Writ of Certiorari.

WILLIAM J. SCOTT
Attorney General
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BY: _____
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The undersigned being duly sworn on oath, deposes and states that a copy of the attached Notice and Brief was served upon the above named party on March 6, 1980 by depositing such copy in the United States mail at 188 W. Randolph Street, Chicago, Illinois.

_____

SUBSCRIBED AND SWORN TO
before me this 6th day
of March, 1980.

_____
NOTARY PUBLIC